Editor's note: Appealed -- dismissed, (mooted by Dept. policy change), Civ. No. F76-201 (D.Alaska 1978)

HERMAN JOSEPH (ON RECONSIDERATION)

IBLA 75-195 (Supp.) Decided October 30, 1975

Petition for reconsideration of decision of the Board of Land Appeals in Herman Joseph, 21 IBLA 199 (1975), rejecting Native allotment application F-14411.

Petition denied, decision reaffirmed.

1. Administrative Practice: Administrative Procedure Act -- Alaska: Native Allotments -- Regulations: Generally -- Secretary of the Interior

   The Secretarial guideline of October 18, 1973, that a Native allotment application should be rejected when the applicant fails to show 5 years of use and occupancy prior to a withdrawal of the land: (a) is not subject to the rule making provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1970); and (b) is a proper exercise of the discretion vested in the Secretary by the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970), the application of which does not violate any right of the allotment applicant.

APPEARANCES: E. John Athens, Jr., Esq., of Alaska Legal Services Corp., Fairbanks, Alaska, for petitioner.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Herman Joseph has petitioned this Board to reconsider its decision Herman Joseph, 21 IBLA 199 (1975), in which the Board affirmed the decision of the Fairbanks District Office, Bureau of Land Management, rejecting petitioner's Native allotment application F-14411. The Board found that the lands applied for were withdrawn

by the filing and notation of power site application F-030632 on January 9, 1963, under the provisions of sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1970), and regulation 43 CFR 2091.2-5(a). The Board further found that because petitioner asserted use and occupancy of the land since 1959, he did not meet the requirement of the Secretarial guideline of October 18, 1973, that a Native applicant complete 5 years of substantial use and occupancy prior to the withdrawal of the land.

In the petition for reconsideration, petitioner argues that the Board failed to treat the following issues raised by the appeal: (1) that retroactive application of the Secretarial guidelines denies petitioner due process of law; (2) that the guidelines could only have been properly imposed through Administrative Procedure Act rule making; and (3) retroactive application of the 5-year guideline is improper in any case.

Although we held these arguments to be without merit, Herman Joseph, supra at 202, we will more fully detail our reasons. The guideline complained of is contained in a Memorandum from the Assistant Secretary, Land and Water Resources, to the Director, Bureau of Land Management, dated October 18, 1973, and provides in pertinent part:

> * * * [I]f a Native has completed the five-year period of statutory substantial use and occupancy prior to the effective date of the withdrawal or reservation, the withdrawal may be revoked and the allotment granted.
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> 2. Where a Native has not completed the five-year period of statutory use and occupancy of lands prior to the effective date of a withdrawal or reservation of the lands, the allotment application should be rejected.

[1] Petitioner asserts a denial of due process in the retroactive application of the guideline because the guideline was issued after the repeal of the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), by sec. 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (Supp. III, 1973), which precluded petitioner from trying to perfect another allotment, and because the guideline alone was responsible for the rejection of his application.

Petitioner's arguments against the retroactive application of the guideline ignore the crucial fact that the

Native Allotment Act, 34 Stat. 197, 43 U.S.C. § 270 (1970), authorized the Secretary of the Interior "in his discretion and under such rules as he may prescribe" to issue allotments. (Emphasis supplied.) See Pence v. Morton, Civ. No. A-74-138 (D. Alaska, April 8, 1975), appeal pending, Civ. No. 75-2144 (9th Cir.). See also Evan Chiskak, 22 IBLA 153, 154, 156, 158 (1975); Terza Hopson, 3 IBLA 134 (1971); Frank St. Clair (On Petition), 53 I.D. 194, 195 (1930). Since appellant had no right to the land, the retroactive application of the guideline could in no sense vitiate any right of appellant.

The Secretary, in the exercise of his discretion, had required 5 years of use and occupancy before the Act of August 2, 1956, 70 Stat. 954, made the requirement mandatory. See Circular No. 1359, 55 I.D. 282 (1935); 43 CFR 67.13 (1938). The additional exercise of discretion, requiring that the 5 years be completed prior to withdrawal, did not violate any right of petitioner to an allotment, and is within the discretionary authority of the Secretary. See Terza Hopson, supra at 143-44 (the Secretary could defeat inchoate settlement rights by the exercise of discretion to allot or not to allot even if the withdrawal at issue did not extinguish such rights). Cf. Donald F. Nielsen, 21 IBLA 258 (1975); Archie Wheeler, 1 IBLA 140, 141 (1970). And, as a statement of Departmental policy, the guideline is binding on this Board. Christian G. Anderson, 16 IBLA 56, 58 (1974).

Petitioner's second argument, that the guideline was issued in violation of the rule making requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1970), ignores the explicit exception contained in that provision regarding "a matter relating to * * * public property * * *." 5 U.S.C. § 553(a)(2) (1970). Public lands are public property, and are therefore exempt from rule making procedures. McNeil v. Seaton, 281 F.2d 981, 986 (D.C. Cir. 1960); Heirs of Dorothy Gordon, 22 IBLA 213 (1975); Arizona Public Service Co., 20 IBLA 120, 122 (1975).

Petitioner's third argument, that retroactive application of the guideline would not be upheld by the courts even in the absence of a due process or APA rule making violation, has been answered above. The 5-year requirement contained in the guidelines is not in derogation of any vested right of petitioner and is within the discretion granted the Secretary by statute. Further, as a Secretarial statement of Departmental policy, it is binding on this Board.

Petitioner asserts that the courts disapprove of agency formulation of policy through adjudication. What is at issue here, however, is an adjudication based upon prevailing policy.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision Herman Joseph, supra, is reaffirmed and the petition for reconsideration denied.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge